

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

LAWRENCE RUSSELL,

Petitioner,

v.

19-CV-1127-V

18-CR-105-V

17-CR-40-V

UNITED STATES OF AMERICA,

Respondent.

NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned will bring this motion before this Court at the United States District Court, 2 Niagara Square, Buffalo, New York, at the convenience of the Court, or as soon thereafter as counsel can be heard.

**MOTION FOR AN ORDER FINDING WAIVER OF ATTORNEY-CLIENT
PRIVILEGE AND MOTION TO COMPEL PRODUCTION OF
CORRESPONDENCE AND MOTION FOR EXTENSION OF TIME TO FILE THE
GOVERNMENT'S RESPONSE TO THE DEFENDANT'S MOTION**

The United States Attorney, by and through its attorney, James P. Kennedy, Jr., United States Attorney for the Western District of New York, Laura A. Higgins, Assistant United States Attorney, hereby moves this Court, upon the annexed affidavit, for an Order that: (1) finds that the petitioner waived the attorney-client privilege with respect to the claims of ineffective assistance of counsel he has raised in his § 2255 motion, (2) compels defense counsel, Mark Foti, Esq., to discuss his representation of the petitioner with the government

as it relates to the petitioner's claims of ineffective assistance of counsel, to disclose to the government any documents in his possession that relate to the petitioner's claims of ineffective assistance of counsel, to provide an affidavit or declaration, if necessary, regarding the petitioner's claims of ineffective assistance of counsel, (3) release to the government copies of the correspondence sent by the petitioner to the Court; and (4) granting an extension of the November 1, 2019 deadline, allowing the government to file its answer to the petitioner's § 2255 motion 60 days subsequent to the Court's issuance or denial of the requested Order and production or denial of the requested correspondence, from whichever date is later.

DATED: Buffalo, New York, October 11, 2019.

JAMES P. KENNEDY, JR.
United States Attorney

BY: s/LAURA A. HIGGINS
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AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

LAURA A. HIGGINS, being duly sworn, deposes and says as follows:

1. I am an Assistant United States Attorney for the Western District of New York and assigned to my office's file regarding this case. This affidavit is submitted in support of the government's motion for an Order granting various relief.

PROCEDURAL HISTORY

2. On July 26, 2018, petitioner pled guilty before the Honorable Lawrence J. Vilardo, United States District Court, to Count 1 of Indictment 17-CR-40, a violation of 21 U.S.C. § 846 (conspiracy to possess with intent to distribute, and to distribute, 500 grams or

more of cocaine and 28 grams or more of cocaine base); and to Count 1 of Indictment 18-CR-105, a violation of 18 U.S.C. § 3146(a)(1) (failure to appear after pre-trial release).

3. On February 8, 2019, this Court sentenced petitioner to a term of 84 months on Count 1 of 17-CR-40 and 24 months on Count 1 of 18-CR-105, to run consecutively, for an aggregate total of 108 months in the custody of the Bureau of Prisons, restitution, and 5 years of supervised release. The judgment of conviction was filed on February 25, 2019.

4. On August 23, 2019, the petitioner filed a motion to vacate his sentence pursuant to Title 28, United States Code, Section 2255, contending that defense counsel provided ineffective assistance for (1) “failing to clearly go over each aspect of the written plea agreement,” (2) failing to contest certain aspects of the Sentencing Guidelines calculations, and (2) failing to file a Notice of Appeal as petitioner alleges he directed counsel to do on February 8, 2019.

5. This Court has ordered the government to respond to the motion to vacate by November 1, 2019.

RELIEF SOUGHT

6. The government's motion first seeks an Order compelling defense attorney Mark Foti, Esq. to discuss with the government, and if necessary, file an affidavit regarding: (a) whether defense counsel advised Russell of the minimum and maximum penalties the defendant was facing if convicted at trial; (b) whether defense counsel explained to Russell the

impact of the how the United States Sentencing Guidelines operate and apply in his case, (c) whether defense counsel specifically discussed the terms of the plea agreement the petitioner entered on July 26, 2018, including the agreement for the application of the weapons enhancement under § 2D1.1(b)(1), (d) whether defense counsel reviewed the Presentence Investigation Report with the petitioner prior to the sentencing proceeding on February 8, 2019; (e) whether the petitioner expressed understanding of the plea agreement, its terms, the U.S. Sentencing Guidelines; and (f) whether the petitioner voluntarily agreed to accept the terms of the plea agreement.

7. Next, the government's motion requests this Court produce for the government's inspection copies of the petitioner's correspondence to the Court during the pendency of the criminal matters. Petitioner specifically references and relies on these items of correspondence in his § 2255 motion. In a footnote on page 2, the petitioner asserts that he "mailed several letters to the U.S. Probation Office, and to this Honorable Court expressing the lack of communication from counsel and his many concerns about several paragraphs in the Presentencing Investigation Report to no avail." Docket 29; 132.¹ The government does not have access to said letters, or even the dates they were communicated (whether before or after the defendant ultimately entered the plea agreement on July 26, 2018), and so cannot remark on their content or legal significance in its answer to petitioner's § 2255 motion.

¹ Unless otherwise noted, all docket references will be provided by listing the Docket Number associated with 18-CR-105 first, and the Docket Number associated with 17-CR-40 second.

8. Finally, the government seeks an extension of the November 1, 2019 deadline, allowing the government to file its answer to the petitioner's § 2255 motion 60 days subsequent to the Court's issuance or denial of the requested Order and production or denial of the requested correspondence, from whichever date is later. This extension is sought to afford the government sufficient time to review the information and materials sought and prepare an answer to the petitioner's § 2255 motion.

WHEREFORE, for all the foregoing reasons, it is respectfully requested, pursuant to United States v. Marks, 764 F. Supp. 2d 585 (W.D.N.Y.), cert. denied 561 Fed. Appx. 42 (2d Cir. 2014), this Court order that the attorney-client privilege has been waived due to Russell's allegation of ineffective assistance, that the government is further entitled to copies of the petitioner's correspondence to the Court during the pendency of his criminal matters, and that the Court further grant an extension of time for the government to respond to the petitioner's § 2255 motion.

s/LAURA A. HIGGINS
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Sworn to before me this 11th
day of October, 2019.

s/LISA M. QUEST
COMMISSIONER OF DEEDS
In And For The City Of Buffalo, N.Y.
My Commission Expires Dec. 31, 2020.